IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 11, 2009

STATE OF TENNESSEE v. MICHAEL R. ANDERSON

Appeal from the Circuit Court for Humphreys County
No. 11283 George C. Sexton, Judge

No. M2008-01230-CCA-R3-CD - Filed March 31, 2009

The Defendant, Michael R. Anderson, was convicted under Tennessee Code Annotated section 55-10-401 of driving under the influence of an intoxicant ("DUI"), a Class A misdemeanor. He was sentenced to eleven months and twenty-nine days in the county jail. The trial court suspended all but seven days of this sentence. He was also fined, stripped of his driver's license for one year, and directed to attend a driving safety school. In this direct appeal, the Defendant argues that: (1) the trial court erred in finding that the State did not violate the rule of sequestration; (2) the trial court should have excluded his blood test results because the State failed to establish a proper chain of custody of his blood sample; and (3) the trial court impermissibly sentenced him based upon facts not found by a jury. We conclude that the trial court properly found no violation of the rule of sequestration and properly sentenced the Defendant. We also conclude, however, that the trial court erred in admitting the Defendant's blood test results. We accordingly reverse his conviction and remand this case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Anthony L. Sanders and Clifford K. McGown, Jr., Waverly, Tennessee, for the appellant, Michael R. Anderson.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Senior Counsel; Dan. M. Alsobrooks, District Attorney General; and Lisa Donegan, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The events underlying this case occurred on November 25, 2005. Officer Rob Edwards of the Waverly Police Department testified that on that day, he responded to the scene of an accident on Burns Street in Waverly. As he approached, Officer Edwards observed a red Chevrolet Camaro that had run off the road. Members of the fire department were already present on the scene. Officer Edwards exited his patrol car and examined the Camaro, beginning on the passenger side. The car had crashed into a group of trees but did not appear to be severely damaged. The air bags had not deployed. Officer Edwards noticed some movement outside the driver's side door; when he walked to that side, he saw the Defendant sitting on the ground.

The Defendant seemed "dazed." After confirming that the he was not injured, Officer Edwards helped the Defendant stand up. He noticed the smell of alcohol on the Defendant's breath, and observed that the Defendant's speech was slurred and eyes were bloodshot. The Defendant first said he had consumed "two or three" alcoholic drinks, then said he had consumed "three or four." The Defendant also stated that he was taking some medication. Officer Edwards walked the Defendant to a nearby level driveway for the purpose of administering two field sobriety tests: a nine-step walk-and-turn and a finger-to-nose test. Officer Edwards explained both tests. The Defendant cooperated and indicated that he understood Officer Edwards' instructions.

The Defendant failed to consistently touch his heel to his toe during the first nine steps of the walk-and-turn test. When turning around, the Defendant paused for an unusually long time. He then took more than nine steps on his way back toward Officer Edwards. The Defendant also attempted the finger-to-nose test, but he swayed, opened his eyes, and failed to touch his finger to his nose.

The Defendant assented to Officer Edwards' subsequent request to draw a blood sample from him. Officer Edwards placed the Defendant in his patrol car and drove him to a local hospital. When they arrived, Officer Edwards watched a medical technician take two vials of blood from the Defendant's arm. This occurred no more than two hours after Officer Edwards first encountered the Defendant.

Officer Edwards testified that, after blood is drawn, the vials are "turned into us [by the person drawing the blood], and then we turn them in." Officer Edwards elaborated that his practice was to "turn [the vials] into our evidence custodian who turns them into the Tennessee Bureau of Investigation for analysis." Officer Edwards did not testify that he or anyone else sealed the test kit and did not describe any steps he might have taken to place identifying marks on the test kit or otherwise label or place identifying marks on the vials.

John Harrison, a Special Agent and forensic toxicologist with the Tennessee Bureau of Investigation, testified that he received a sealed blood alcohol level test kit "on Michael Robert Anderson" through the United States mail on December 8, 2005. Agent Harrison testified that the kit displayed no signs of tampering. After they had been labeled with a laboratory number for

identification purposes, he tested the two vials of blood in the kit for alcohol content on December 28, 2005, at 5:25 p.m. The State introduced a copy of Agent Harrison's resulting lab report, which showed a blood alcohol level of .21%. Agent Harrison, who had been certified as an expert in forensic toxicology, opined that a blood alcohol level of .20% in an individual weighing 200 pounds indicates that the individual had consumed about fourteen alcoholic drinks.

The Defendant chose not to testify, but presented two witnesses, David Denton and B.J. Hall. Both were members of the Waverly Fire Department on November 25, 2005, and were present at the scene of the Defendant's accident. Neither Hall or Denton saw any alcohol in the Defendant's car that night, nor did either remember smelling any alcohol. Also, Hall and Denton had both known the Defendant before the accident because the Defendant had been a fireman before joining the military and serving in Iraq. They both testified that the Defendant had suffered through problems with anxiety and poor concentration since his return from Iraq.

The jury convicted the Defendant of one count of DUI. He now appeals.

Analysis

I. Violation of Sequestration Rule

The Defendant first contends that the State violated Tennessee Rule of Evidence 615 ("Rule 615"), which states that "[a]t the request of a party the court shall order witnesses . . . excluded at trial . . . . The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibit created in the courtroom by a witness."

After Officer Edwards' testimony, the State requested and received a recess. During this recess, the State apparently discussed with Agent Harrison the testimony offered by Officer Edwards that the Defendant had claimed to have consumed "two to three" or "three to four" drinks. The Defendant argues that this violated Rule 615, pointing to the text of the rule and the Advisory Commission Comment that "[i]f 'The Rule' is to be meaningful . . . lawyers and others should be instructed not to transmit what witnesses say in court."

Rule 615 specifies, however, that it does not apply to "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Tenn. R. Evid. 615. The 2004 Advisory Commission Comment to Rule 615 states that "[e]xpert witnesses generally should be considered 'essential persons' and therefore should not be sequestered." Further, our supreme court has stated that

> the dangers Rule 615 is intended to prevent generally do not arise with regard to expert witnesses in any proceeding. In fact, the rules of evidence provide that an expert witness may testify and base an opinion on evidence or facts made known to the expert at or before a hearing and the facts need not be admissible at trial. See Tenn. R. Evid. 703. Moreover, an expert witness often may need to hear the substance of the testimony of other witnesses in order to formulate an opinion or respond to the opinions of expert witnesses.

State v. Bane, 57 S.W.3d 411, 423 (Tenn. 2001).

Agent Harrison's testimony that about fourteen drinks would be necessary to produce a .20% blood alcohol level in a 200 pound individual was, in part, offered to rebut the Defendant's statements to Officer Edwards that he had consumed at most four drinks. This issue is without merit.

II. Chain of Custody

The Defendant next raises four concerns regarding the chain of custody of his blood sample between the time it was drawn and its receipt by Agent Harrison, arguing that the State failed to establish: (1) that the blood alcohol test kit was in proper working condition; (2) that the Defendant's blood was drawn using proper procedures; (3) the precise handling of the test kit while it was in Officer Edwards' possession; and (4) the precise handling of the test kit after Officer Edwards transferred it to the evidence custodian. The Defendant objected at trial to introduction of his blood test results, based in part upon "the chain of custody."

Tennessee Rule of Evidence 901(a) states that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." For tangible evidence, "a witness must be able to identify the evidence or establish an unbroken chain of custody." State v. Kilpatrick, 52 S.W.3d 81, 87 (Tenn. Crim. App. 2000). The purpose of the chain of custody requirement is to "demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence." State v. Braden, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993). "The identity of tangible evidence need only be shown with reasonable assurance; all possibility of tampering or doubt of identity need not be eliminated. The trial judge's decision on the sufficiency of proof as to chain of custody will not be overturned unless there is a clear mistake." State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989) (citations omitted).

We see no merit in the Defendant's first three arguments. First, Officer Edwards testified that the test kit at issue was a standard one provided to the hospital by the TBI and stored in a nearby cabinet or drawer; in the absence of evidence to the contrary, we conclude that this constitutes a reasonable assurance that the kit was not contaminated or defective in some way. Second, the Defendant's blood was drawn by a medical professional for the purpose of completing a standardized test kit; again, absent evidence to the contrary, we are reasonably assured that proper procedures were followed. Finally, the Defendant notes that Officer Edwards only testified regarding general police policy when asked about his disposition of the test kit. He said, essentially, that standard practice was to deliver such kits to the evidence custodian. He did not, however, explicitly testify that he had done so with the Defendant's test kit. Nevertheless, we conclude that his testimony clearly implied that he delivered the kit to the evidence custodian in this case, and we cannot conclude that the trial court made a clear mistake in finding reasonable assurance thereof.

The Defendant's final argument focuses on the uncertainties surrounding the condition and handling of the test kit during the time Officer Edwards received the evidence, delivered it to his evidence custodian, and the time it arrived at the TBI. The Defendant relies on State v. Charles

Drake, No. E2004-00247-CCA-R3-CD, 2005 WL 1330844 (Tenn. Crim. App., Knoxville, June 6, 2005), for the proposition that the State failed to adequately prove the chain of custody during that period. In Drake, the State had established at trial that a police officer had observed the defendant's blood being drawn, sealed the resulting blood vial and paperwork into the test kit, and delivered it to a designated after-hours drop-box. Next, a property custodian, other than the one who had actually received the sample, introduced a business record showing that the test kit had been delivered to the TBI. Finally, two TBI forensic scientists established that the test kit had been received in a sealed condition and that the blood vial had been marked with a distinguishing laboratory number. Drake, 2005 WL 1330844, at *12.

This Court found that this chain of custody evidence was "minimal but adequate." Id. at *13. We agree with the Defendant that the chain of custody evidence in this case falls short of the "minimal" Drake level in two particular respects: the State failed to present evidence of when or by whom the Defendant's test kit was sealed and failed to present any testimony regarding what steps, if any, were taken to distinguish or identify the Defendant's test kit so as to reduce the possibility of mistake.

The police officer in Drake specifically noted that he sealed the test kit upon receiving the blood vial. Id. at *12. In this case, Officer Edwards said nothing about sealing the Defendant's test kit, nor did he testify that standard police procedure required the sealing of such a kit. Because no evidence was presented that the test kit was sealed at the time Officer Edwards delivered it to his evidence custodian, there is no reasonable assurance that it was not tampered with before arriving at the TBI in a sealed condition. See Braden, 867 S.W.2d at 759. Finding a reasonable assurance under these circumstances would require us not only to presume the existence of standard police sealing procedures, but also to presume that any such procedures were followed in this case.

Similarly, the State did not present any evidence that any distinguishing marks were made on the exterior of the Defendant's test kit, that any identifying paperwork was placed inside it, or that any other tracking or identification methods were used. Again, we cannot presume the existence of standard police procedures, nor can we presume that they were followed in a particular case. Therefore, the record on appeal does not provide a reasonable assurance that the Defendant's test kit was not substituted or mistaken for another. See id.

We conclude that our reasoning in this case conforms with our supreme court's opinion in State v. Scott, 33 S.W.3d 746 (Tenn. 2000). In Scott, two hairs taken from the victim were placed in an envelope and sent to the Federal Bureau of Investigation ("FBI") for DNA analysis. When the hairs were received back from the FBI, they had been mounted on slides. The State had presented testimony from the detective who sent the hairs to the FBI and received them back; it had presented no testimony that "the mounted hair samples were the same hairs as the ones originally taken from the victim," and no testimony regarding "how the hairs came to be mounted on the slides." Id. at 761. The court concluded that the State had failed to prove the chain of custody.

In this case, the State failed to present evidence that the test kit received by the TBI was the same one that Officer Edwards delivered to his evidence custodian and failed to present testimony establishing how the test kit was sealed. These evidentiary gaps are very similar to those in Scott. Accordingly, we conclude that the trial court made a "clear mistake" in holding that the State had provided a reasonable assurance of the integrity of the Defendant's blood sample. See Kilburn, 782 S.W.2d at 203.

Tennessee Rule of Criminal Procedure 52(a) states that "[n]o conviction shall be reversed on appeal except for errors that affirmatively appear to have affected the result of the trial on the merits." The Defendant was charged with DUI under Tennessee Code Annotated sections 55-10-401(a)(1) and (a)(2). As such, we acknowledge that the Defendant could have been found guilty even if his blood test had been excluded, given Officer Edwards' testimony that the Defendant had driven his car off the road, smelled of alcohol, and failed two field sobriety tests. A blood alcohol test result is particularly strong evidence of guilt, however. We therefore cannot conclude that the jury would necessarily have found the Defendant guilty had his blood test been properly excluded. We therefore are unable to conclude that the error is harmless.

We accordingly reverse the Defendant's conviction and remand for a new trial. See, e.g., State v. Cannon, 254 S.W.3d 287, 292 (Tenn. 2000) (conviction reversed and case remanded for new trial where physical evidence of rape was non-harmlessly admitted).

III. Sentencing

To facilitate possible further appellate review, we evaluate the Defendant's sentence without regard to our decision above that his blood test should have been excluded. The trial court ordered the Defendant to serve seven days of his eleven month and twenty-nine day sentence based on Tennessee Code Annotated section 55-10-403(a)(1)(A)(ii)'s requirement that "if at the time of [the DUI] offense the alcohol concentration in [a defendant's] blood or breath is twenty hundredths of one percent (.20%) or more, the minimum period of confinement for [the defendant] shall be seven (7) consecutive calendar days rather than forty-eight (48) hours." The Defendant next argues that this finding violated his rights under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), because it increased his sentence from a minimum of forty-eight hours to a minimum of seven consecutive days.

Blakely and Apprendi, however, only addressed situations in which facts not found by a jury increase a defendant's sentence above a prescribed statutory maximum. Apprendi held in relevant part that "other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In this case, the trial court did not do so. Further, this Court has held that "Blakely has no impact on a trial court's sentencing determinations involving misdemeanor convictions because there is no presumptive minimum for a misdemeanor sentence." State v. Everett J. Dennis, No. M2005-00178-CCA-R3-CD, 2006 WL 721301, at *4 (Tenn. Crim. App., Nashville, Mar. 21, 2006) (citing State v. Brenda Bowers, No. E2004-01275-CCA-R3-CD, 2005 WL 1827844, (Tenn. Crim. App., Knoxville, Aug. 3, 2005)). In other words, the Defendant received a sentence

that he could have lawfully received even had the trial court not found that he had a blood alcohol level of .20% or greater at the time of his offense. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we conclude that the trial court did not err in finding no violation of Tennessee Rule of Evidence 615 or in sentencing the Defendant. We do, however, conclude that the trial court erred in admitting the Defendant's blood test results because the State failed to establish a proper chain of custody of his blood sample. Accordingly, we vacate the Defendant's conviction and remand this case for a new trial.

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DAVID H. WELLES, JUDGE